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OCTOBER TERM, 1905.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

No. 347.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE UNITED STATES AND THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE CHEROKEE NATION.

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The Cherokee Nation is a body politic. As such it was and still is competent to prosecute this suit in the name which the persons collectively composing the body long

since assumed and by which such persons acting collectively have been recognized and dealt with for many years past by the United States.

In an hysterical memorandum prefixed to their main brief, counsel for the Eastern Cherokees explain that though in said brief they have referred to the Cherokee Nation as a "body politic" "in the sense and to the extent only that it might be regarded as a government," nevertheless they "emphatically deny that the Cherokee Nation is a body politic, and do not concede that it ever has been a body politic or a body corporate recognized as such by the United States."

In both their main and reply brief they indicate a belief that there is a distinction, appreciable though subtle, between the Cherokee Nation when considered "as a tribe of Indians" and "as a body politic," and on page 4 of the latter brief they say:

> "It is obvious the suit of the Cherokee government appearing under the title 'Cherokee Nation' should have been brought by the title 'Cherokee Tribe' as instructed by the jurisdictional act. The tribe furnished the outlet, and the tribe was the principal in that contract of December 19, 1891, while the Cherokee government designated 'Cherokee Nation' was merely an agency through which the tribe acted. The agent is dead. The tribe survived."

The distinction sought to be drawn and the results which are supposed to follow from such distinction, if it exists, may not be of serious moment, but in order that one may not be misled either by the confusion of ideas under which counsel appear to labor or by the inaccurate statements of fact, it may not be amiss to reply briefly to these suggestions.

The first petition filed in these consolidated cases was filed in the name of the "Cherokee Nation," and asserted that said nation was "acting in its own behalf and in behalf of

the individuals who are members and citizens of said nation and interested in the subject-matter of this petition," and averred that—

"The Cherokee Nation, claimant herein, is and since the act of union between the Eastern Cherokees and Western Cherokees, on July 12, 1839, has been, a body politic, recognized and dealt with as such by the United States in all matters affecting the rights, interests, and property of the Cherokee Nation or Tribe, or the members thereof; and is as such the 'Cherokee Tribe' mentioned in section 68 of the act of Congress aforesaid (July 1, 1902) and authorized thereby to bring this proceeding."

An early edition of Bouvier defines "body politic" to be—

"The collective body of a nation under civil government. As the persons who compose the body politic so associate themselves, they take collectively the name of the people or nation."

A more recent authority (the Century Dictionary and Cyclopedia) under the word "politic," proffers this definition:

"That (what) constitutes the State; consisting of citizens; as the body politic (that is, the whole body of the people as constituting a State)."

And cites by way of illustration a portion of the preamble of the "Covenant of Plymouth Colony," as follows:

"We the loyal subjects of * * * King James * * * do by these presents solemnly and mutually, in the presence of God and one another, covenant and combine ourselves into a civil body politic." * * *

A State is undoubtedly a body politic, and the terms "Nation" and "State" are frequently employed not only in the law of nations, but in common parlance as importing the same thing; but it is said that the term "Nation" is more strictly synonymous with *people* than with the term

"State," and while a single State may embrace different nations or peoples, a single Nation may be so divided politically as to constitute several States.

As early as 1831 this court decided that the Cherokee people constituted a State and that they had been uniformly treated as such

"from the settlement of our country. The numerous treaties made with them by the United States, recognized them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for a violation of their engagements, or for any agression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts."

Cherokee Nation *vs.* Georgia, 5 Peters 1, 16.

Since the rendition of that judgment the right of the Cherokee people to maintain an action in the name of the Cherokee Nation would seem to have been put beyond dispute.

When the ancient Cherokee Nation by an agreement amongst its citizens approved by the United States separated into two bodies, such bodies so long as they remained separate communities possessed severally all the attributes of political sovereignty which the ancient nation had theretofore possessed and were so recognized by the United States.

When in 1839 the Eastern and Western Cherokees became reunited they declared in a solemn act of union seemingly modeled upon the declaration of the Plymouth Colony above quoted that

"We, the people composing the Eastern and Western Cherokee Nations, in national convention assembled, by virtue of our original and unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic under the style and title of the Cherokee Na-

tion. * * * And, also, that all rights and titles to public Cherokee land on the east or west of the River Mississippi, with all other public interests which may have been vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpared in the Cherokee Nation as constituted by this union."

Notwithstanding learned counsel for the Eastern Cherokees solemnly deny that any such act of union was adopted or, if adopted, that it had any valid force, still such act of union has heretofore been recognized by this court (The Cherokee Trust Funds, 117 U. S., 288, 303–5: United States *vs.* Old Settlers, 148 U. S., 427, 444) and the "Cherokee Nation" thereby created has been repeatedly recognized by the Congress (Treaty August 6, 1846; Treaty July 19, 1866; Treaty April 27, 1868; Agreement of December 19, 1891, for sale of Cherokee Outlet as ratified and confirmed by act of March 3, 1893, and other acts and appropriation laws too numerous to cite).

It is true that section 68 of the act of July 1, 1902, confers jurisdiction upon the Court of Claims to adjudicate any claim which the "Cherokee *tribe*, or any band thereof," may have against the United States, but it is also true that section 1 of said act specifically declares that—

"The words 'nation' and 'tribe' shall each be held to refer to the *Cherokee Nation* or tribe of Indians in Indian Territory."

Whatever criticism might have been justified by the institution of this action under the title of "The Cherokee Tribe," it would seem to be certain that no foundation for just criticism arises out of the fact that it was instituted under the title of "The Cherokee Nation."

Again, it is asserted by learned counsel for the Eastern Cherokee (Reply Brief, pp. 2–3), "that the 'Cherokee Nation'

as a government did not own the Outlet. The Outlet was the property of the Cherokee tribe, 'of the whole Cherokee people' under article 1, treaty of 1846."

This suggestion was laid at rest forever by the decision of this court in the case of the Cherokee Trust Funds (117 U. S., 288, at p. 308), where, considering the claim of the Western Cherokees to exclusive participation in the proceeds of the sales of certain lands in the Cherokee Outlet, under the provisions of the treaty of July 19, 1866, this court said:

"Their claim, however, rests upon no solid foundation. The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sales made of any part of them. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. Our Government, by its treaties with the Cherokees, recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character. Their treaties of cession must, therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members."

It has been repeatedly urged by counsel for the Eastern Cherokees that judgment should not be affirmed in favor of the "Cherokee Nation," because the nation could neither receipt for nor distribute the proceeds of any such judgment. Likewise the burden of complaint on the part of other counsel for individual Eastern Cherokees was that if the judgment of the Court of Claims should be sustained and the nation as such permitted to distribute the proceeds thereof, such individual Eastern Cherokees would receive little or

no consideration, and would probably receive nothing as its share.

And, again, it is suggested that certain provisions of the acts of Congress of June 7, 1897, and June 28, 1898 (30 Stats., 62, 83, 502 *et seq.*), had had the effect of practically abolishing the Cherokee government, and that section 19 of the latter act had specifically prohibited the "payment of any moneys on any account whatever" "by the United States to any of the tribal governments or any officer thereof."

Without pausing to consider whether in fact either of the last-mentioned statutes has any real bearing upon the matter in hand, it would seem to be sufficient to say that the Congress itself by the act of July 1, 1902 (32 Stats., 716), authorizing the Cherokee Nation in express terms to institute this suit, distinctly recognized the continued existence of the "tribal government of the Cherokee Nation," and with the assent of the nation itself provided for its discontinuance only after March 4, 1905 (sec. 63, act July 1, 1902, 32 Stats., 716).

It is true that for some years past the Cherokee Nation has been without tribal courts, and by paramount authority its people and their property rights have been subjected to the judicial processes of the courts of the United States, but that fact has not served to lessen the hold of the nation upon the national property or funds or claims.

If it be true that by the provisions of the act of June 28, 1898, alluded to, and to the terms of which the Cherokee Nation seemingly did not assent, the United States was prohibited from making payments to the tribal government or any officer thereof for disbursement, that fact would be of no moment here, for the Cherokee Nation is not asking the payment of the proceeds of this judgment to itself in its tribal or governmental capacity or to any of its officers, so that it or he may control the distribution thereof. On the contrary, the Cherokee Nation, claimant, recognizing the

binding force of the various provisions of the jurisdictional act of July 1, 1902, complains of the judgment of the Court of Claims upon the sole ground that that court has directed the distribution of the proceeds of the judgment, which proceeds would clearly constitute "monies accruing under the provisions of this act" (sec. 66) in a manner other than that distinctly prescribed in said act, to which the legal voters of the Cherokee Nation in national election assembled fully assented.

Both the act of 1898, upon which counsel for the Eastern Cherokees lean, and said act of 1902 provide for the distribution of national and *per capita* funds through the Secretary of the Interior. Neither the Cherokee Nation, nor its national council, nor any of its executive officers pretend any claim of right to receive, either officially or individually, the proceeds of any judgment which may go in favor of the nation, but they do assert that such proceeds when payable will constitute common property of the nation or tribe, distributable in accordance with the terms of the act of 1902, and not otherwise.

If the act of March 3, 1903, be supposed to authorize any different method of distribution of common property than that provided for by said act of 1902, then it is to such extent at least invalid, for it has never received the assent of the communal owners of the property affected by it.

It is also said that the Cherokee Nation, as such, had prior to July 1, 1902, expressly conceded the exclusive right of the Eastern Cherokees to the proceeds of any judgment which might be obtained upon the item here in dispute. If this be true in point of fact, it does not so appear from the record in this cause, and no proof of such fact was offered.

It is quite true that attorneys for the Eastern Cherokees in their intervening petition filed in case No. 23,199 (R., 39–40) asserted that the Cherokee national council, by

an act on December 7, 1900, expressly conceded the exclusive right of the Eastern Cherokees to the moneys in question, but this averment was expressly traversed by the Cherokee Nation, which denied the existence of any such act as was described, and no proof in support of such averment was offered on behalf of the Eastern Cherokees. The fact is that if any such act was passed by the national council it was expressly disapproved by the President of the United States in the exercise of his supervisory authority under the act of Congress in such case provided (31 Stats., 1058, 1077).

If such supposed act of the Cherokee council constitutes the "last will and testament" of the Cherokee Nation, to which counsel refer on page 7 of their reply brief, it can have no effect upon this controversy, for it has been denied probate by an authority possessed of exclusive jurisdiction in the premises.

Whatever may have been the view of the Cherokee national council in the premises, it was clearly subject to the subsequent action of the Cherokee people composing the Cherokee Nation, as evidenced by the acceptance of the provisions of the act of July 1, 1902, which must constitute the rule and measure by which this branch of the contention before the court must be settled.

By that act and its ratification both the people of the nation and the Congress of the United States provided generally for the institution of the present suit on behalf of the former, and specifically indicated the manner in which attorneys on behalf of the nation should be employed and how they should be compensated. It is conceded that the Eastern Cherokees since 1839, by force of numbers, have dominated the Cherokee Nation. As the dominant party in the nation their votes served to ratify the agreement of July 1, 1902. It is not denied that the attorneys representing the nation have been employed and arrangements have been

made for their compensation in accordance with the provisions of said agreement. Nor is it denied that they have rendered some service in the prosecution of the case. So far such services appear to have been to a degree at least effective; whether ultimately they will appear to have been so must abide the mandate of this court. If the Eastern Cherokees for any reason deemed it desirable that they should be represented doubly before the trial and appellate tribunals, first, as members of the nation, and, second, as a separate band, they no doubt had the right to so elect and to contract accordingly, but exactly why their separate attorneys should seek to raise any question concerning the compensation of the attorneys for the nation is not perceived. If the judgment of the Court of Claims in favor of the nation should be affirmed, the contract heretofore entered into between the nation and its attorneys, formerly approved by the Commissioner of Indian Affairs and the Secretary of the Interior and filed in the Department of the Interior, as required by law, will probably be found to sufficiently protect the rights of the parties thereto. No question upon this score was determined by the Court of Claims, and in the absence of the contract itself, or any copy thereof in the record, it would not seem to be open for consideration by this court. With respect to the allowances of fees and expenses to attorneys otherwise situated, all question was reserved by the Court of Claims until the coming in of the mandate of this court, and no question has been raised upon the record concerning such action.

Unless the judgment in favor of the Cherokee Nation by name should be affirmed, the question of the right of the attorneys appearing on behalf of the nation to receive compensation for services rendered will be of but little moment.

It is suggested, however, that this court should interfere in the matter of the allowance of fees to the attorneys for the nation because the nation is prosecuting this claim in

opposition to the vast body of its citizens, viz., the Eastern Cherokees, and that, therefore, even in the event of a successful outcome, the proceeds of the judgment ought not to be reduced by the expenses of the nation in obtaining it because of the individual interest of the Eastern Cherokees therein. The fallacy of this objection is too obvious to require extended comment. The nation in prosecuting this claim is acting on behalf of all of its members and with the assent of the majority of its members, as evidenced by their ratification of the act of 1902, under which the action was brought. Neither the nation nor its attorneys oppose the claim of the Eastern Cherokees as component members of the nation to recover under and through the latter their proportionate shares of the item in controversy, such shares to be determined and distributed as provided in the act of 1902. The sole opposition between the nation and the Eastern Cherokees, individually or as a band, grows out of the contention of the latter to an exclusive right which is put forth under the provisions of the act of March 3, 1903, to which act neither the nation nor its citizens ever assented. It does not appear, indeed, that either the nation or any of its component elements have ever been made aware of the terms of said act of 1903, nor can it be gleaned from the record at hand that the Eastern Cherokees are in fact represented by attorneys employed by "the band acting through a committee recognized by the Secretary of the Interior" or "by their proper authorities."

As above stated, the nation, as will appear from its petition, sues in its own behalf and "in behalf of the individuals who are members and citizens of said nation" (R., 1), and the denial contained in its replication (R., 40) must be read in the light of the above averment and held to refer, as was the intention, to the Eastern Cherokees acting as a band and not to refer to them in their individual capacities as citizens of the nation.

The futility of the claim of exclusive right put forth in behalf of the Eastern Cherokees generally is demonstrated by the decision and opinion of this court in the case of the *Old Settlers vs. United States*, 148 U. S., 427, 471, *et seq.*, and the utter want of foundation for the suggestion of right of participation on the part of these Eastern Cherokees and their descendants who never went West, but severed their relations with the nation or tribe and became citizens of Georgia, will fully appear from a review of the opinion of this court in the case of *The Cherokee Trust Funds*, 117 U. S., 288, 308–310.

The two cases last cited review all the complicated tangle of treaties and statutes pertaining to the relations between the United States and the Cherokee Nation prior to the agreement of December 19, 1891, which together with the act of Congress of March 3, 1893, affords solid support for the present contentions on behalf of the nation. In the absence of the agreement of 1891 and the act of 1893 the pending claims in their present form as presented on behalf of the several claimants could not be maintained in favor of any of the claimants, notwithstanding the provisions of the act of July 1, 1902, for each of the claimants rests its claim upon the accounting made and rendered by the United States to the Cherokee Nation under the provisions of said act. In the absence of the act of 1893 such accounting, even if made, would have been without validity and of no binding force. It would seem that the Eastern Cherokees, acting as a separate band, could not rely upon the accounting rendered under the act of 1893 and the agreement of 1891 therein referred to, and at the same time avoid legal consequences which necessarily follow from their plain terms.

Under the treaty of 1846 the *per capita* distribution to both Western and Eastern Cherokees growing out of the sales of lands east of the Mississippi had been fully and, as it was then thought, finally provided for. Whatever else

might be due from the United States on such account was communal and belonged to the whole Cherokee people as such. Both the Cherokee people and the United States so understood the matter, as the agreement of 1891 and the act of 1893 amply evidence. It was the nation that asserted that a balance was due to it on account of the cession of the lands east, and it was to the nation that the United States agreed to account and to pay any balance which might be found to be due. It was to the nation that the account showing a balance in its favor was submitted, and it was the nation, solemnly acting by resolution of its national council, that accepted the account as rendered and requested payment from the United States of such balance due. It was with the nation that the United States contracted as per the act of July 1, 1902, and the contract was none the less a national contract, because it provided therein that it was to be ratified by the majority vote of its qualified individual citizens.

This case presents complications and grave difficulties only when the contentions of the individuals, as opposed to the contention of the body politic, are brought into the foreground. So long as the matter is considered solely as between the United States and the Cherokee Nation, all questions pertaining both to the right of recovery and the method of distribution to ultimate beneficiaries are devoid of complexity, for elemental principles of law control the one, while the terms of the act of 1902 control the other.

It seems to be unnecessary to say anything further upon the subject of interest. By the account which the Interior Department, acting under the authority of Congress, as expressed in the act of 1893, rendered to the Cherokee Nation the claim of the latter for interest upon the principal sums was expressly conceded and the principal items were declared to be due with interest from specified dates. Balances shown by said account rendered by the United States

to be due to the nation " with interest at the rate of five per cent. per annum from the various dates," &c., &c., was accepted by the latter as correct and payment thereof requested from Congress. The Congress has neither repudiated the account as rendered nor denied the right of the nation to receive interest as well as principal in payment.

The act of 1902 conferred jurisdiction upon the Court of Claims without restriction in either respect, and the principles which justified this court in giving judgment for interest in the Old Settlers case (*ubi supra*), when applied to the facts of this case, would seem to require the allowance of interest here.

The learned assistant attorney general concedes that interest was properly allowed by the accountants upon three of the four items covered by the judgment under review, that with respect to such items the accountants had power and authority to consider the claim for interest, and if found to be well founded to award it. But he asserts that the same accountants in regard to the fourth item were without power to award interest, even though they may be found to have acted rightly in finding that the principal sum was due.

The power of the accountants and of their official superiors under the act of 1903 was the same with respect to one item as it was with respect to the other. No restrictions or limitations were laid upon them save that the claims which they were to adjust by the account to be rendered were those relating to moneys " due to the Cherokee Nation " under certain specified treaties and laws of Congress. If they had authority to find for interest in respect of any item they had it in respect to all.

It has been strenuously contended on behalf of the United States that the " expert persons " employed under the act of 1893 to render the account of moneys due the Cherokee Nation exceeded the authority with which they were endowed,

and in proof of this reference is made to the communication of February 6, 1892, from the Commissioner of Indian Affairs to the Secretary of the Interior on the subject of an appropriation to be made for the purpose of defraying the expenses of the accounting (see brief on behalf U. S., p. 25), but the learned assistant attorney general seems to have entirely overlooked the fact that both the Commissioner of Indian Affairs and the Secretary of the Interior approved and adopted their report when it was submitted in due course, and neither of those officials appears to have thought either that the accountants had exceeded their authority or had acted otherwise than had been contemplated at the time of their employment.

The contemporaneous acceptance of the result of their labors without objection on the part of the executive officials, whose duty it was to construe and execute the law under which the accountants were acting, should have great weight with any court, and the fact that Congress, when the report was brought to its attention, did not declare it invalid because not rendered in accordance with its prior law on the subject would seem to put an end to further contention on that score.

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